Supreme Court, U.S.
FILED

95 1075 JAN 2 - 1996

No. 95-851
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1995

Denise Chavez,

*Cross-Petitioner,*

v.

The University of Houston,
Arte Publico Press, & Nicolas Kanellos,

*Cross-Respondents.*

**On Petition And Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

KENNETH E. KUFFNER
3131 Eastside, Suite 500
Houston, TX 77098
P.O. Box 25914-534
Houston, TX 77265
(713) 520-5174
Counsel of Record

DAVID M. GUNN
1900 Memorial
Houston, TX 77007
(713) 236-1722

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

## QUESTION PRESENTED

Under the liberal system of "notice pleading" set up by the federal rules, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993), may a heightened pleading requirement be imposed in cases against individual government officials (especially where Congress has abolished immunity for individual government officials in cases of copyright or trademark infringement)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED ..... 1

RULE INVOLVED ..... 2

STATEMENT ..... 2

REASONS FOR GRANTING THE WRIT ..... 4

1. This Court has reserved the question in the past ..... 5

2. This Court has actually granted certiorari on the question in the past ..... 5

3. The circuits take conflicting approaches to the question ..... 6

4. Congress has abolished all immunity for cases of copyright or trademark infringement ..... 8

CONCLUSION ..... 9

# TABLE OF AUTHORITIES

Page

CASES

Babb v. Dorman, 33 F.3d 472 (5th Cir. 1994) ..... 6

Baxter v. Vigo County School Corp., 26 F.3d 728 (7th Cir. 1994) ..... 6

Billman v. Indiana Dep't of Corrections, 56 F.3d 785 (7th Cir. 1995) ..... 6

Black v. Lane, 22 F.3d 1395 (7th Cir. 1994) ..... 6

Branch v. Tunnell, 14 F.3d 449 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994) ..... 7

Edgington v. Missouri Dep't of Corrections, 52 F.3d 777 (8th Cir. 1995) ..... 7

Hammes v. AAMCO Transmissions, 33 F.3d 774 (7th Cir. 1994) ..... 7

Johnson v. Jones, 115 S. Ct. 2151 (1995) ..... 6

Kimberlin v. Quinlan, 6 F.3d 789 (D.C. Cir. 1993), *reh'g en banc denied*, 17 F.2d 1525 (1994), *rev'd on other grounds*, 115 S. Ct. 2552 (1995) ..... 8

Kimberlin v. Quinlan, 115 S. Ct. 2552 (1995) ..... 5, 6, 8

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993) ..... 5, 6, 7

Mid America Title Co. v. Kirk, 991 F.2d 417 (7th Cir. 1993) ..... 7

Mitchell v. Forsyth, 472 U.S. 511 (1985) ..... 3

Palmer v. Board of Education, 46 F.3d 682 (7th Cir. 1995) ..... 6, 8

TABLE OF AUTHORITIES – Continued

Page

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684 (1993) ..... 3

Siegert v. Gilley, 111 S. Ct. 1789 (1991) ..... 5

STATUTES

15 U.S.C. § 1122(a) ..... 1, 8

17 U.S.C. § 501(a) ..... 8

17 U.S.C. § 511(a) ..... 1, 8

28 U.S.C. § 2403(a) ..... 3

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 59 F.3d 539, and reprinted in Pet. App. A. The orders of the United States District Court for the Southern District of Texas are unreported and reprinted in Pet. Apps. B and C.

## JURISDICTION

The court of appeals entered judgment on Aug. 1, 1995 and denied a timely petition for rehearing on Aug. 30, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The petition for writ of certiorari was docketed on Nov. 27, 1995. This conditional cross-petition is filed in reliance on Rule 12.5.

## STATUTES INVOLVED

17 U.S.C. § 511(a) provides in part:

> . . . any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune . . . from suit . . . for a violation of any of the exclusive rights of a copyright owner. . . .

15 U.S.C. § 1122(a) provides in part:

> . . . any officer or employee of a State or instrumentality of a State acting in his or her official

capacity, shall not be immune . . . from suit . . . for any violation under this chapter.

## RULE INVOLVED

Rule 8(a) of the Federal Rules of Civil Procedure provides in part: "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."

## STATEMENT

This is a copyright infringement case against a state university and one of its employees.

Cross-petitioner Denise Chavez is an author who made a contract with the University of Houston for publication of her books. Cross-respondent "Arte Publico Press," a publisher, is a constituent part of the university rather than a separate entity, and the university is an arm of the State of Texas. Cross-respondent Nicolas Kanellos, a university employee, is the person responsible for publishing operations by Arte Publico Press.

Chavez is the author and copyright owner of *The Last of the Menu Girls*. She agreed in a series of contracts that the university had exclusive rights to publish a certain number of copies of the work. A copyright dispute arose over whether the contract allowed the university to publish copies in excess of the agreed number. The university also published a collection of plays in a book called *Shattering the Myth*. A university catalog named her as

having chosen the plays to be included there. A dispute arose over the university's right to exploit her name and reputation.

Chavez filed suit in 1993 alleging (a) federal causes of action under the Copyright Act and the Lanham Act, and (b) state law causes of action. She sued the university and Mr. Kanellos. The district court had jurisdiction under the intellectual property laws and the supplemental jurisdiction statute. 28 U.S.C. §§ 1338, 1367(a). The university and its employee moved to dismiss on the grounds of immunity. The university claimed Eleventh Amendment immunity on the theory that a state university is the state itself; its employee, Mr. Kanellos, claimed qualified immunity.

The district court denied the motion to dismiss. Pet. App. A-21. The university and its employee appealed. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 689 (1993) (denial of Eleventh Amendment immunity is an appealable order); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (denial of qualified immunity is an appealable order). They argued that Congress lacks the power to override Eleventh Amendment immunity.

Because the appeal called into question the constitutionality of certain federal statutes that abrogate that immunity, the United States intervened on appeal. *See* 28 U.S.C. § 2403(a) (court "shall permit the United States to intervene"). The United States urged the court to uphold the statutes. Two amici curiae – The Authors Guild, Inc. and The Association of American Publishers, Inc. – filed briefs urging the same result.

The court of appeals affirmed in part and reversed in part. First, it upheld the statutes. It held that Congress'

abrogation of Eleventh Amendment immunity was constitutional. The university is therefore subject to suit under the Copyright Act and the Lanham Act. Pet. App. A-17. Second, it held that the university remains immune with respect to the state law causes of action. Pet. App. A-18. Finally, it held that the university employee is entitled to assert qualified immunity, and that the claims against him must be dismissed because they failed to satisfy a heightened pleading standard: "because plaintiff has failed to allege facts which would enable her to recover against Kanellos in his individual capacity, he is entitled to qualified immunity. *See Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)." Pet. App. A-19.

This cross-petition challenges only the holding that a heightened pleading requirement would be imposed. There are additional facts that bear on the Eleventh Amendment issue, but they are not material to the question presented here.

## REASONS FOR GRANTING THE WRIT

The question presented here – whether a "heightened pleading" requirement may be imposed in cases against individual government officials – is an important issue of federal procedure which recurs frequently. There are several reasons for granting the writ: (1) this Court has left this question open, (2) this Court has actually granted review on the question in the past, (3) the circuits take conflicting approaches to the question, and (4) Congress has abolished immunity in cases of copyright or trademark infringement. At any rate, if the Court is going to

decide the Eleventh Amendment issue, it would make sense to decide the heightened pleading question at the same time.

**1. This Court has reserved the question in the past.**

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993) the Court rejected a "heightened pleading" requirement. The Court held that it was "impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 1163. But since the defendant happened to be a municipality rather than an individual, the Court confined its holding to suits against municipalities, thus reserving the question whether the Court's "qualified immunity jurisprudence would require a heightened pleading in cases involving individual governmental officials." *Id.* at 1162. This case offers an opportunity to reach the question that *Leatherman* reserved.

**2. This Court has actually granted certiorari on the question in the past.**

The Court has twice granted review on this question. In *Siegert v. Gilley*, 111 S. Ct. 1789 (1991) the issue was raised in one of the questions presented but the case was decided on other grounds. *See id.* at 1796-97 (Marshall, J., dissenting) (quoting the questions presented). Last Term, in *Kimberlin v. Quinlan*, 115 S. Ct. 2552 (1995) the issue came up again for plenary review but no decision on the merits resulted. After oral argument, the Court vacated

and remanded *Kimberlin* for reconsideration in light of the later decision in *Johnson v. Jones*, 115 S. Ct. 2151 (1995). What *Leatherman* left open remains undecided, and the need for a decision from this Court has only grown. This case offers an opportunity to complete the unfinished business of determining whether a heightened pleading standard may ever be imposed.

**3. The circuits take conflicting approaches to the question.**

After *Leatherman*, it is hard to see how a heightened pleading standard could ever be proper. The court of appeals, however, held that under its own pre-*Leatherman* precedents, heightened pleadings were still required in cases against individuals. *See* Pet. App. at A-19 (relying on *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985)). The court has made the same holding in several other post-*Leatherman* cases. *See, e.g, Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994).

This approach conflicts with that of the Seventh Circuit: "As the Supreme Court recently has made very clear, there is no heightened pleading requirement for civil rights actions." *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 734 (7th Cir. 1994); *see Palmer v. Board of Education*, 46 F.3d 682, 688 (7th Cir. 1995) (school desegregation suit against individual officials: court holds that there is no heightened pleading requirement); *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994) (suit against individual officials: court holds that there is no heightened pleading requirement in any § 1983 suits); *see also Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 790 (7th Cir. 1995) (dictum:

heightened pleading requirements are "of highly doubtful propriety after *Leatherman*"). As Chief Judge Posner has repeated in dictum:

> The Federal Rules of Civil Procedure do not require the plaintiff to plead the particulars of his claim, Fed.R.Civ.P. 8(a)(1) with the exceptions (of which the best known is fraud) listed in Rule 9(b). *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75, 79 (1992). A nascent movement to add judge-made exceptions to those listed in Rule 9(b), well described in *Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 862-64 (1st Cir. 1993), was scotched by the Supreme Court in *Leatherman*.

*Hammes v. AAMCO Transmissions*, 33 F.3d 774, 778 (7th Cir. 1994). The Seventh Circuit has even applied *Leatherman* to a case brought under the statute involved here. *See Mid America Title Co. v. Kirk*, 991 F.2d 417, 421-22 (7th Cir. 1993) (copyright case: no heightened pleading standard).

For all the various fact patterns in the Seventh Circuit cases, one thing is clear: had these exact facts arisen in the Seventh Circuit instead of the Fifth Circuit, the outcome would have been ***precisely contrary*** to the one reached here.

We concede that the Seventh Circuit holds the minority view. Most circuits mechanically follow pre-*Leatherman* precedents and insist on heightened pleadings. These courts acknowledge *Leatherman*, but they excuse their anti-*Leatherman* stance as required by circuit precedent. *See Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 n.3 (8th Cir. 1995) (heightened pleading "remains the governing law of this circuit"); *Branch v. Tunnell*, 14 F.3d

449, 456 (9th Cir.) ("we lack authority to reconsider" circuit precedent requiring heightened pleading), *cert. denied*, 114 S. Ct. 2704 (1994); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.9 (D.C. Cir. 1993) (heightened pleading "remains the governing law of this circuit"), *reh'g en banc denied*, 17 F.2d 1525 (1994), *rev'd on other grounds*, 115 S. Ct. 2552 (1995). Writing for the Seventh Circuit, Judge Easterbrook has called the D.C. Circuit's holding in *Kimberlin* "inconsistent with this circuit's position." *Palmer*, 46 F.3d at 688.

**4. Congress has abolished all immunity for cases of copyright or trademark infringement.**

Applying a heightened pleading standard here would seem anomalous since Congress has decreed that there shall be ***no*** immunity at all for a person who is sued for copyright or trademark infringement. 15 U.S.C. § 1122(a); 17 U.S.C. §§ 501(a), 511(a). Respondent Kanellos simply has no immunity. If he has no immunity, there is no basis for imposing a heightened pleading standard. The court of appeals, however, ignored the plain language of the statutes.

This cross-petition is conditioned on the granting of the petition on the Eleventh Amendment issue.

## CONCLUSION

If the petition is granted, this cross-petition should also be granted.

Respectfully submitted,

KENNETH E. KUFFNER
3131 Eastside, Suite 500
Houston, TX 77098
P.O. Box 25914-534
Houston, TX 77265
(713) 520-5174
Counsel of Record

DAVID M. GUNN
1900 Memorial
Houston, TX 77007
(713) 236-1722

95-1075 (2)

Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

No. 95-851

In The
**SUPREME COURT OF THE UNITED STATES**
October Term, 1995

Denise Chavez
*Cross-Petitioner*

v.

The University of Houston,
Arte Publico Press, & Nicholas Kanellos,
*Cross-Respondents.*

**On Petition And Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

# BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General for Litigation

DELMAR L. CAIN
Chief, Tort Litigation Division

PATRICK J. FEENEY
Assistant Attorney General
Counsel of Record
Tort Litigation Division
PO. Box 12548
Austin, Texas 78711-2548
(512) 463-2197

15 pp

## QUESTIONS PRESENTED

Under the system of "notice pleading" set up by the federal rules as explained in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993), may a heightened pleading requirement be imposed in cases against individual government officials who assert qualified immunity as a defense?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| STATUTES INVOLVED | 1 |
| ADDITIONAL RULE INVOLVED | 2 |
| STATEMENT | 2 |
| BRIEF IN OPPOSITION TO CROSS-PETITIONER'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI | 4 |
| 1. Kanellos has asserted qualified immunity; the University has not | 4 |
| 2. Congress has not abolished Kanellos' qualified immunity | 5 |
| 3. This case is not controlled by *Leatherman* | 6 |
| CONCLUSION | 9 |

# TABLE OF AUTHORITIES


**CASES** **PAGE**

*Baxter v. Vigo County School Corp.*, 26 F.3d 728 (7th Cir. 1994 ..... 6

*Chavez v. Arte Publico Press*, 59 F. 3rd 539 (5th Cir. 1995) ..... 1, 3

*Elliott v. Perez*, 751 F.2d 1472 (5th Cir 1985) ..... 7

*Hammes v. Aamco Transmissions, Incorporated*, 33 F.3d 774 ..... 8

*Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982) ..... 6, 7, 8

*Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct. 394 (1994) ..... 6

*Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160 (1993) ..... 4, 6, 7

*Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985) ..... 6, 7, 9

*Palmer v. Board of Education*, 46 F.3d 682 (7th Cir. 1995) ..... 6

**STATUTES**

15 U.S.C. A.§ 1122(a) ..... 1, 6

17 U.S.C. A. § 511(a) ..... 1

17 U.S.C.A. § 511 ..... 6

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. A.§ 2072(b) ..... 2, 9

42 §1983 ..... 6

Rules Enabling Act ..... 8

Tex. Educ. Code Ann. § 111.01 et seq. ..... 2

## OTHER AUTHORITIES

Appropriations Act 1989, 71st Leg., 1st C.S., Session Laws, Ch. 1263, p. 5624 ..... 2
Appropriations Act 1991, 72nd Leg. 1st C.S., Session Laws, Ch. 19, p. 875 ..... 2
Appropriations Act 1993, 73rd Leg., Session Laws, Ch. 1051, p. 5161 ..... 2
Appropriations Act 1995, 74th Leg., Session Laws, Ch. 1063, p. 5554 ..... 2

## RULES

Rule 12.5 ..... 1
Rule 8 ..... 9
Rule 9 ..... 8
Rule 9(a) ..... 8
Rule 9(a) of the Federal Rules of Civil Procedure ..... 2

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 59 F.3d 539, and reprinted in Pet. App. A. The orders of the United States District Court for the Southern District of Texas are unreported and reprinted in Pet. App. B and C.

---

The court of appeals entered judgment on Aug. 1, 1995 and denied a timely petition for rehearing on Aug. 30, 1995.

The petition for writ of certiorari was docketed on Nov. 27, 1995. The conditional cross-petition was filed in reliance on Rule 12.5.

---

## ADDITIONAL STATUTES INVOLVED

17 U.S.C. A. § 511(a) provides in part:

> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, . . . for a violation of any of the exclusive rights of a copyright owner. . . .

15 U.S.C. A.§ 1122(a) provides in part:

> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune,

> under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, . . . for a violation under this chapter.

28 U.S.C. A.§ 2072(b) provides:

> Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

## ADDITIONAL RULE INVOLVED

Rule 9(a) of the Federal Rules of Civil Procedure provides in part: "It is not necessary to aver the capacity of a party to be sue or be sued ..., except to the extent required to show the jurisdiction of the court."

## STATEMENT

The University of Houston is a public institution of higher education established by the State of Texas, and funded and operated in accordance with Texas law. Tex. Educ. Code Ann. § 111.01 et seq.; Appropriations Act 1989, 71st Leg., 1st C.S., Session Laws, Ch. 1263, p. 5624; Appropriations Act 1991, 72nd Leg. 1st C.S., Session Laws, Ch. 19, p.875; Appropriations Act 1993, 73rd Leg., Session Laws, Ch. 1051, p. 5161; Appropriations Act 1995, 74th Leg., Session Laws, Ch. 1063, p. 5554. Arte Publico Press is a constituent part of

the University operating under the auspices of and controlled by the University. Nicholas Kanellos, the individual whose conduct is at issue in Chavez' Conditional Cross-Application for Writ of Certiorari, is a state employee who acted on behalf of the Press, and therefore on behalf of the University. Kanellos is the official responsible for the operations of the Press including the negotiation and performance of the Publishing Agreement(s) in dispute. Kanellos in his official capacity, the Press and the University are legally indistinguishable, for which reason the Petitioners' Petition referred to them collectively as "the University."

The truly significant issue in this case is whether the Eleventh Amendment of the United States Constitution bars a suit against a Texas university, the University of Houston, for alleged violations of the Copyright and Lanham Acts. At the core of this issue is the question of Congress' power to abrogate a state's sovereign immunity affirmed under the Eleventh Amendment to the United States Constitution. It is this immunity that has been asserted to bar suit in federal court against the University itself, its academic press and the director of that press in his official, but not individual, capacity.

At the trial level, Kanellos asserted qualified immunity in his personal, as opposed to official, capacity. The procedural vehicle for this assertion was the Defendants Motion to Dismiss. The trial court denied this Motion. This decision was appealed to the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit upheld Kanellos' claim of qualified immunity in his personal capacity. *Chavez v. Arte Publico Press,* 59 F. 3rd 539 (5th Cir. 1995).

## BRIEF IN OPPOSITION TO CROSS-PETITIONER'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

The Cross Respondent, Nicholas Kanellos, is filing this Response to the Cross-Petitioner's Conditional Cross Petition for Writ of Certiorari in order to clarify issues raised in the Cross-Petitioner's Petition, which that petition addresses inadequately. In doing so, the Cross-Respondent recognizes certain of the Cross-Petitioner's propositions; to wit, 1) that this Court has reserved in the past the issue of the suitability of the heightened pleading rule in suits brought against state officials who may defend against liability in their personal capacity by an assertion of qualified immunity, 2) that this Court has granted certiorari on this issue in the past, and 3) that a certain amount of conflict exists among the circuits concerning the propriety of a heightened pleading standard. Nevertheless, there are certain matters which the Cross-petitioner wishes to point out to the Court which may bear in the Court's mind on the issuance of the Writ sought by the Cross-Petitioner. These include assertions (1) that only Kanellos has asserted qualified immunity to suit in federal court, (2) that qualified immunity has not been abolished by Congress as apparently asserted by the Cross-Petitioner, and (3) that *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* does not control the outcome of this case.

### 1. Kanellos has asserted qualified immunity; the University has not.

From the Cross-Petitioner's Cross-Petition, it is unclear against whom she seeks relief or the capacity in which relief is sought, although an inference may be possible that relief is ought only against Kanellos in his

personal capacity. The confusion stems from the fact that the only place in which the Cross-Petitioner has sought to identify against whom she seeks relief is in the caption on the cover, in which she identified the University of Houston and Arte Publico Press as Cross Respondents. It is the position of Kanellos, the University and Arte Publico Press that this is mistaken.

At the District Court the University, Arte Publico Press and Kanellos asserted their respective immunities. The University, the press and Kanellos in his official capacity asserted Eleventh Amendment immunity and the related unconstitutionality of certain Congressional enactments which purport to abolish that immunity. These are the issues which have been raised by the Petitioners in their Petition for Writ of Certiorari, to which issues the Cross-petitioner declined to file a response.

Likewise at the District Court, Kanellos asserted qualified immunity as a defense to liability in his personal capacity. This is an immunity that is not shared by the University or the press. This assertion was made in a joint Motion to Dismiss filed by all Defendants in the trial Court, but which clearly identified Kanellos as the moving party with respect to the claim of qualified immunity.

**2. Congress has not abolished Kanellos qualified immunity.**

The Cross-Petitioner argues that Congress has abolished all immunity for cases of copyright or trademark infringement. From the text of the pertinent statutes, as quoted at the outset of the Cross-Petition, this seems plausible. However, it must be realized that the ellipses in those quotations mask serious textual omissions. Those ellipses omit language limiting the

scope of Congress' abrogation of immunity. In fact. 15 U.S.C.A § 1122(a) and 17 U.S.C.A. § 511, the pertinent texts of which appears at the beginning of this Brief, on their face abolish only abolish eleventh amendment immunity and any other doctrine of sovereign immunity which might be asserted in defense.

Qualified immunity falls outside the scope of both eleventh amendment immunity and sovereign immunity. In the simplest terms Eleventh Amendment immunity and sovereign immunity protect the State - and in particular its Treasury- *See e.g., Hess v. Port Authority Trans-Hudson Corporation,* 115 S.Ct. 394, 404 (1994) and cases cited therein. Qualified immunity by contrast protects the official - and his or her personal fortune - from exposure to suit and liability. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)

**3. This case is not controlled by *Leatherman.***

The Cross Petitioner approaches this case simply as one controlled by *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 113 S.Ct. 1160 (1993). Indeed, some of the cases from the Seventh Circuit cited by the Cross-Petitioner appear to conclude that *Leatherman* abolished any heightened pleading rule attendant to qualified immunity. *See, e.g., Baxter v. Vigo County School Corp.,* 26 F.3d 728,734; (7th Cir. 1994); *Palmer v. Board of Education*, 46 F.3d 682,688 (7th Cir. 1995). Nevertheless, other circuits have recognized that Leatherman concerned the "applicability of a heightened pleading standard to §1983 actions alleging municipal liability" *Leatherman, supra,* at 1161 and that the Court in *Leatherman* expressly refused to consider the issue of whether the Court's "qualified immunity jurisprudence would require a heightened pleading in cases involving

individual government officials, *Leatherman*, *supra*, at 1162.

Kanellos would assert that this Court's qualified immunity jurisprudence amply distinguishes this case from *Leatherman.* In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982), this Court established that qualified immunity rests on the objective reasonableness of an official's conduct as measured by reference to clearly established law. As established in *Harlow*, this objective qualified immunity standard permits the defeat of insubstantial claims without resort to trial. By analogy to *Harlow*, Cross-Petitioner needed to show that Kanellos conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818, 102 S.Ct. at 2738. This standard has been further tightened in *Mitchell v. Forsyth*, 472 U.S. 511, 526 105 S.Ct. 2806, 2815, (1985) in which this Court indicated that a defendant-official was immune from suit if the Plaintiff's allegations did not state a violation of clearly established law of which a reasonable person would have known. *Mitchell, supra* at 472 F.2d 511, 526. 105 S.Ct 2806, 2815

This standard has been given practical effect in the Fifth Circuit through the heightened pleading standard adopted in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir 1985) and applied herein. Therein the Court of Appeals held recognized that this Court had effectively made the negation of qualified immunity a prerequisite to proceeding in the District Court. Hence the Court required:

> In cases against governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaint state with

> factual detail and particularity the basis for the claim which necessarily includes why the defendant official cannot successfully maintain the defense of immunity.

This format is not inimical to the Federal Rules of Civil Procedure, as might be contended by the Cross-Petitioner. Rule 9 clearly contemplates circumstances requiring more definite pleadings than are generally required by Rule 8. Rule 9(a) generally dispenses with any necessity to plead a party's capacity to be sued, but expressly limits this dispensation. The pertinent portions provide:

> It is not necessary to aver the capacity of a party to sue or be sued . . . except to the extent required to show the jurisdiction of the court.

Clearly, the Fifth Circuit's heightened pleading rule is in keeping with Rule 9(a) and its clear implication that the plaintiff must aver sufficiently the defendant's capacity to be sued to establish the jurisdiction of the court to hear the proceeding. As noted in the *Hammes* case cited by the Cross-Petitioner:

> Naturally, therefore, it [the Court] relies on the complaint to say enough about jurisdiction to create some reasonable likelihood that the court is not about to hear a case that is not supposed to have the power to hear. *Hammes v. Aamco Transmissions, Incorporated,* 33 F.3d 774, 778. (ellipses not in original).

Alternatively, it would violate the Rules Enabling Act not to require such a heightened pleading. The Rules Enabling Act authorizes this Court to prescribe general

rules for the federal courts subject to the limitation that "such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C.A. §2072(b) The defense of qualified immunity prohibits plaintiffs from exposing officials to the burdens associated with litigation, *Mitchell*, 472 U.S. at 526, *Harlow*, 457 U.S. at 813. For this reason Rule 8 would violate the Rules Enabling Act if it were simply applied in qualified immunity cases as it is in more routine matters.

## CONCLUSION

Even if the petition is granted, the cross-petition should not be granted.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General for Litigation

DELMAR L. CAIN
Chief, Tort Litigation Division

PATRICK J. FEENEY
Assistant Attorney General
Counsel of Record
Tort Litigation Division
PO. Box 12548
Austin, Texas 78711-2548
TEL: (512) 463-2197
FAX: (512) 463-2224

CO-COUNSEL:
JOHN FEATHER
JEFFREY A. PYLE
VADEN, EICKENROHT,
THOMPSON, & FEATHER,
L.L.P.
One Riverway, Suite 1100
Houston, Texas 77056
TEL: (713) 961-3525

ATTORNEYS FOR PETITIONERS

February 20, 1995